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No. 87-2034

In the Supreme Court of the United States

OCTOBER TERM, 1988

JACQUELINE BARBERA, PETITIONER

v.

STEPHEN SCHLESSINGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner seeks review of the court of appeals' holding that her constitutional tort claim against respondent is barred by the doctrine of qualified immunity.

1. Petitioner's decedent was cooperating with federal authorities in a criminal investigation when she was abducted and murdered at the instigation of the target of the investigation. Petitioner thereafter brought this action against respondent, a former Assistant United States Attorney, and two other defendants, former Attorney General William French Smith and former United States Attorney John S. Martin, Jr. Petitioner sued the defendants in both their individual and official capacities, seeking damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, and the constitutional tort doctrine of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court dismissed (Pet. App. 22a-24a) petitioner's FTCA claim because it had not been brought in accordance with the

requirements of the FTCA. The court also dismissed (*id.* at 37a-44a) petitioner's *Bivens* claim against former Attorney General Smith for lack of personal jurisdiction.

Petitioner's *Bivens* claim against the remaining two defendants alleged that respondent and Martin had violated the decedent's right to life under the due process clause by recklessly revealing the fact that she was a cooperating witness and then failing to provide her with police protection. Respondent and Martin moved to dismiss the suit on the grounds that petitioner had failed to state a constitutional claim. The district court denied the motion. The court held (Pet. App. 27a-28a) that, although "there is no general constitutional right to government protection from criminals or madmen and, as a result, no constitutional duty on the part of the government to provide such protection," nonetheless "a right and corollary duty to [provide] basic protective services may arise out of a special relationship assumed or created by a government entity in regard to a particular person * * * such as when the government itself has put an individual in danger." The court acknowledged (*id.* at 28a) that the contours of this "special relationship" were "hazy and indistinct" but nonetheless concluded (*id.* at 35a-37a) that the decedent had such a special relationship with the defendants insofar as she was a cooperating witness placed in danger by the fact that the defendants divulged her cooperation. The court further held (*id.* at 60a-67a) that petitioner's claim was not barred by either absolute prosecutorial immunity (see *Imbler* v. *Pachtman*, 424 U.S. 409, 420 (1976)) or qualified immunity (see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)).

2. The district court (Pet. App. 68a) certified for interlocutory appeal under 28 U.S.C. 1292(b) the issues of whether petitioner had stated a cause of action and

whether respondent and Martin were entitled to immunity. The court of appeals, after granting the requisite permission to appeal (Pet. App. 3a), reversed and remanded the case with instructions to enter judgment for respondent and Martin (*id.* at 15a). The court held (*id.* at 6a), first, that petitioner had failed to state a claim against defendant Martin because the complaint failed to plead any facts demonstrating either personal involvement in the actions allegedly leading to decedent's death or any facts demonstrating reckless supervision within the United States Attorney's office.[1]

The court of appeals, while noting (Pet. App. 7a) that this Court in *Daniels* v. *Williams*, 474 U.S. 327, 334 n.3 (1986), had "explicitly left open the question of whether grossly negligent or reckless conduct would be sufficient to allege a constitutional violation," found it unnecessary to decide whether petitioner had stated a cause of action against respondent. Instead, the court concluded (Pet. App. 12a-14a) that respondent was entitled to qualified immunity because at the time he acted there was no clearly established constitutional right to police protection in the circumstances of this case.[2] The court "express[ed] no opinion on how this question would be resolved based on the caselaw as it exists today" (*id.* at 14a). The court stated (*ibid.*), however, that "[i]n 1981-82, it would have been speculative, at best, to conclude that [decedent] was entitled to police protection, or that the government was otherwise obliged to safeguard her from those against whom she was going to testify."

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[1] Petitioner does not seek review of the court of appeals' disposition of her claims against defendant Martin (see Pet. 12).

[2] The court concluded (Pet. App. 12a) that "[t]he conduct in this case was not sufficiently linked to the court-related duties of a prosecutor to entitle [respondent] to absolute immunity."

3. In *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), slip op. 4-5, this Court noted that in order to defeat a government official's assertion of qualified immunity in a case seeking damages for an alleged violation of a constitutional right, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. * * * [I]n the light of preexisting law the unlawfulness must be apparent." The court of appeals properly concluded (Pet. App. 14a) that the unlawfulness of respondent's alleged conduct was "speculative, at best" and, thus, far from "apparent" in 1982.

In *Estelle* v. *Gamble*, 429 U.S. 97, 103-105 (1976), this Court stated that deliberate indifference to serious medical needs of prisoners would violate the Eighth Amendment based on "the government's obligation to provide medical care for those whom it is punishing by incarceration." In *Martinez* v. *California*, 444 U.S. 277 (1980), however, this Court declined to extend the reasoning of *Estelle* to the non-custodial situation of a person murdered by a paroled prisoner five months after his release. While the Court did "not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole" (444 U.S. at 285 (footnote omitted)), it did hold under the particular circumstances that the murder was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law" (*ibid.*).

The rationale of *Estelle* was extended by the Second Circuit in *Doe* v. *New York City Dep't of Social Services*, 649 F.2d 134 (1981), cert. denied, 464 U.S. 864 (1983), to persons not within the government's immediate physical control. In that case, the court held that the government had assumed a duty of care to a child that it placed in foster

care. But *Doe* still involved a custodial relationship, in which the government had custody, though not immediate physical control over, the child. As the Second Circuit noted in this case, there was in 1981 and 1982 an "absence of any significant caselaw on governmental duties arising from non-custodial relationships" (Pet. App. 13a).[3]

The issue of the existence and scope of a constitutional duty to protect a citizen in the absence of a custodial relationship is currently before the Court in *Deshaney* v. *Winnebago County Dep't of Social Services*, cert. granted, No. 87-154 (Mar. 21, 1988), in which the Court is reviewing the Seventh Circuit's holding that a state social services agency is under no constitutional duty to protect a child from abuse by his father, although the agency had reason to believe that the child was in danger. The Court's decision in that case may establish whether there is a constitutional right to protection in a non-custodial relationship,

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[3] *White* v. *Rochford*, 592 F.2d 381 (7th Cir. 1979), and *Wagar* v. *Hasenkrug*, 486 F.Supp. 47 (D. Mont. 1980), upon which petitioner relies (Pet. 15), both involved custodial relationships, at least indirectly. In *Wagar*, the police first arrested an intoxicated individual, thereby arguably assuming a duty of care for his condition under *Estelle*, and then simply left him outdoors where he died from pancreatitis. In *White*, the police arrested the driver of an automobile and then left the children accompanying him alone in the car without making any provision for them. Arguably, when the police arrested the man, they assumed a duty of care for the children analogous to that in *Doe*. The Seventh Circuit has repeatedly distinguished *White* and ruled for the defendants in subsequent cases not involving custodial relationships. See, *e.g.*, *Archie* v. *City of Racine*, No. 86-1783 (May 23, 1988) (en banc); *Ellsworth* v. *City of Racine*, 774 F.2d 182 (1985), cert. denied, 475 U.S. 1047 (1986); *Jackson* v. *Byrne*, 738 F.2d 1443 (1984); *Beard* v. *O'Neal*, 728 F.2d 894, cert. denied, 469 U.S. 825 (1984); *Bowers* v. *DeVito*, 686 F.2d 616 (1982). Thus, it can hardly be said that the decision in *White* "clearly established" the rights in question here.

but it will not alter the fact that in 1981 petitioner's decedent did not have a "clearly established" constitutional right to such protection. Indeed, the fact that the Court has found it necessary to decide the issue indicates that the right in question has not been established even today, much less clearly established.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
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JULY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60574